No. 87-256

Supreme Court, U.S.
FILED
SEP 14 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CHARLES S. CHRISTENSEN, *et al.*,

Petitioners,

—v.—

KIEWIT-MURDOCK INVESTMENT CORPORATION, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

DANIEL J. BELLER
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Counsel of Record for Respondents

Of Counsel:

Kevin McNulty
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

ZELDES, NEEDLE & COOPER
333 State Street
P.O. Box 1740
Bridgeport, Connecticut 06601
(203) 333-9441

QUESTION PRESENTED

Did defendants' tender offer to shareholders of a defendant corporation during the pendency of a purported shareholder class action amount to a "bad faith" violation of Rule 23(e), Fed. R. Civ. P., and thereby justify charging defendants with plaintiffs' attorneys' fees, where the action was never certified as a class action; the plaintiff class did not release its claims in the tender offer or obtain the relief demanded in the complaint; and the named plaintiffs embraced the tender offer on advice of counsel and then moved to dismiss the action as moot?

The United States Court of Appeals for the Second Circuit answered this question in the negative.

LIST OF PARTIES AND RULE 28.1 LIST

Petitioners are listed in the petition. Respondents are: Kiewit-Murdock Investment Corporation, Peter Kiewit Sons, Inc., Pacific Holding Corporation, KMI Continental Inc., The Continental Group, Inc., David H. Murdock, Raymond F. Henze, III, Walter Scott, Jr. and Donald L. Sturm. The parties before the Court of Appeals were the same. S. Bruce Smart, Jr., although listed in the caption as a respondent, was not a party to the Second Circuit appeal. He appeared, with separate representation, as a defendant in the District Court proceedings.[1]

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1 Respondent KMI Continental Inc. is the successor via merger to respondent The Continental Group, Inc. Respondent Kiewit-Murdock Investment Corporation owns 100% of the outstanding common stock of KMI Continental Inc. The outstanding common stock of Kiewit-Murdock Investment Corporation is owned 80% by respondent Peter Kiewit Sons, Inc. and 20% by respondent Pacific Holding Corporation.

The entities affiliated with KMI Continental Inc., Kiewit-Murdock Investment Corporation and Peter Kiewit Sons, Inc. required to be disclosed under Rule 28.1 are: V. K. Mason Construction, Ltd.; Gulf Marine Fabricators, Inc.; Union Rock & Materials Corporation; Kiewit Electrical Corporation; Bayshore Concrete; Security Offshore Insurance, Ltd.; Harbor Holdings, Inc.; Schmalbach-Lubeca AG; Altradec AG; bebo-Plastik GmbH & Co Kg; Continental Can European Industries N.V.; Elbatainer Kunststoff—und Verpackungs GmbH; Elbatainer France SARL; Elbatainer (UK) Ltd.; MPB Foliengesellschaft; Thomassen & Drijver-Verblifa N.V.; Sobemi N.V.; CCL Industries, Inc. (Canada); Braskraft S.A. Florestal E Industrial; Shellmar Embalagem Moderna S.A.; CCL Industries, Inc.; Compania De Envases, S.A. (Uruguay); Continental Can Hong Kong Limited (Hong Kong); Continental Can Nigeria Limited (Nigeria); Continental Can Saudi Arabia, Ltd. (Saudi Arabia); Convertidora Venezolana De Papel, S.A.; De Clerck N.V. (Belgium); Desamacon Holding B.V.; Dominquez & Cia. Caracas S.A. (Venezuela); Dominquez Continental, S.A. (Venezuela); Doosan Continental Can Manufacturing Co., Ltd.; ETS Schuybroek S.A. (Belgium); Fabrica Boliviana De Envases S.A. (Bolivia); Industrias Del Norte, S.A. (Peru); Industrias Reunidas, S.A. (Peru); Metalurgica Matarazzo, S.A. (Brazil); P.T. United Can Company Limited (Indonesia); Societe Francaise de Development de la Boite-Boisson-SOFREB S.A. (France).

Pacific Holding Corporation was dissolved as of May 1, 1986 and reincorporated shortly thereafter. The present Pacific Holding Corporation has no parent corporation or subsidiaries. Its sole shareholder is respondent David H. Murdock.

TABLE OF CONTENTS

	PAGE
Question Presented	i
List of Parties and Rule 28.1 List	ii
Table of Authorities	iv
Counterstatement of the Case	1
The Decisions Below	3
REASONS FOR DENYING THE WRIT	5
I. THERE IS NO CONFLICT WITH ANY OTHER CASE ON AN ISSUE OF IMPORTANCE WORTHY OF THIS COURT'S REVIEW	5
II. THIS CASE IS NOT A SUITABLE VEHICLE FOR REVIEW BY THIS COURT OF ANY ISSUE PRESENTED IN THE PETITION	8
Conclusion	9

TABLE OF AUTHORITIES

Cases: PAGE

Deposit Guaranty National Bank v. *Roper*, 445 U.S. 326 (1980) 6

Kahan v. *Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied sub nom. Glen Alden Corp. v. Kahan*, 398 U.S. 950 (1970) 5-7

Moreland v. *Rucker Pharmacal Co.*, 63 F.R.D. 611 (W.D. La. 1974) 5

Rice v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70 (1955) 5

Webster Eisenlohr, Inc. v. *Kalodner*, 145 F.2d 316 (3d Cir. 1944) (*in banc*), *cert. denied*, 325 U.S. 867 (1945) 7

Weight Watchers of Philadelphia v. *Weight Watchers International*, 455 F.2d 770 (2d Cir. 1972)..... 4, 6

Other Authorities:

Internal Operating Procedures, 3d Cir., ch. 8(C)..... 7

Rule 23(e), Fed. R. Civ. P. .....4, *passim*

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BRIEF IN OPPOSITION

COUNTERSTATEMENT OF THE CASE

This action arises out of the merger of defendant The Continental Group, Inc. into defendant KMI Continental, Inc., a subsidiary of defendant Kiewit Investment Corporation. Pursuant to the merger, holders of certain Continental stock received cash in exchange for their shares while others—holders of Preferred and Series C Preference Stock—received stock in the successor company. (3a.)[1]

The action was commenced as a putative class action on behalf of those shareholders who did not receive cash in the merger. The complaint alleged violations of the federal securities laws and state common law.

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1 Pages in the appendix to the petition for a writ of certiorari are designated "__a."

After defendants moved to dismiss the complaint, plaintiffs filed an amended complaint with different plaintiffs, different defendants, and different theories of the case. The amended complaint alleged that, as a consequence of the merger, plaintiffs were left with devalued stock in the surviving corporation, which had taken on substantial additional debt to consummate the merger. This was alleged to constitute a "manipulation," in violation of the federal securities laws, and a breach of fiduciary duties owed by defendants to plaintiffs under New York law. (5a-6a.)

The amended complaint was accompanied by a motion for an order certifying the broadest possible class. Plaintiffs also moved for an order scheduling a hearing on the class certification motion prior to defendants' expected motion to dismiss. In its discretion, the District Court concluded that it would be preferable first to address the motion to dismiss. Defendants thereafter moved to dismiss the amended complaint. (6a.)

During the pendency of the motion, defendant Kiewit Investment Corporation commenced a tender offer for the outstanding shares of KMI Continental Preferred and Series C stock. The tender offer was a public event of which plaintiffs (as offerees) and their counsel were fully aware. The tender offer did not resolve the litigation. The cash offered in the tender offer was less than the redemption value demanded in the complaint and was offered only to holders of stock at the time of the tender offer, not to the purported plaintiff class. No releases of any claims in the litigation were sought or obtained in connection with the tender offer. (6a-7a, 14a.)

Plaintiffs took no steps to block the tender offer, preserve any fund or press their certification motion. Instead, plaintiffs' counsel advised plaintiffs to tender their shares pursuant to the tender offer in mitigation of damages. Plaintiffs' counsel advised plaintiffs that, in tendering their shares, "you have not lost your right to assert claims in [the present] action." (7a.)

Subsequently, the parties to the litigation appeared in the District Court for oral argument on defendants' motion to dismiss. Defendants presented their argument in support of the motion to dismiss. Plaintiffs, however, chose not to address the motion. Instead, counsel for plaintiffs announced that the case was moot on the purported ground that the cash received by plaintiffs in the tender offer was "substantially equivalent" to the relief sought in the action. (7a.)

The District Court directed plaintiffs to submit a memorandum describing the claims of the named parties which remained outstanding and stating whether the action should be dismissed or withdrawn. Plaintiffs' submission asserted that (1) the case was moot; (2) the action should be dismissed; (3) no notice to the putative class was required "since it had not [been] determined that a . . . class action could be maintained"; and (4) the court should retain jurisdiction to hear an application for attorneys' fees. (7a.)

At no time did plaintiffs request the court to decide the previously filed certification motion. Instead, plaintiffs filed an application requesting attorneys' fees of $3,575,699. (7a.)

The Decisions Below

The District Court granted plaintiffs' motion to dismiss the action, but denied the request for an award of attorneys' fees against defendants on the ground that it was "legally unwarranted." (28a.)

The Court of Appeals affirmed the District Court by a majority decision (1a-24a). The Second Circuit recognized that, under the "American Rule," absent a statutory or common law exception, each party is obligated to pay its own attorneys' fees. Finding no such exception established by the facts of this case, the Second Circuit held that plaintiffs were not entitled to recover attorneys' fees from defendants. (8a.)

The Court of Appeals specifically rejected plaintiffs' claim to fees under the "bad faith" exception to the American Rule (18a)—the only basis for relief asserted in the petition to this

Court. Plaintiffs had argued that the tender offer was an extra-judicial settlement of the action that violated Rule 23(e), Fed. R. Civ. P., which requires court approval for "dismissal or compromise" of a "class action."

The Second Circuit held, however, that even if the tender offer were viewed as a settlement of the action it would not constitute a "bad faith" violation of Rule 23(e). This was not a class action because no class had been certified. The Court noted that, under clear Second Circuit precedent, the negotiation of settlements with class members *prior* to class certification does not violate Rule 23(e), even if such settlements have the effect of mooting a potential class action. ***Weight Watchers of Philadelphia*** v. ***Weight Watchers International***, 455 F.2d 770, 773 (2d Cir. 1972) (Friendly, J.). The Court of Appeals believed that defendants were entitled to rely on *Weight Watchers* in good faith. (13a-14a.)

The Second Circuit also held that, under the facts of this particular case, the tender offer was not a "dismissal or compromise" of the action within the meaning of Rule 23(e). On the record of this case, no claims of class members were relinquished; no releases were obtained; the class tendering their shares was smaller than the putative class; and the relief fell short of that demanded in the complaint. (14a.)[2]

The Second Circuit further rejected plaintiffs' claim that the District Court had abused its discretion in hearing the motion to dismiss before the class certification motion. And the Second Circuit held that, in any event, a claim that the District Court had erred in doing so, even if it gave rise to an appeal, would not give rise to a claim of bad faith against defendants. The panel explicitly declined to decide the question whether a fee award against defendants would have been proper if the tender offer had occurred *after* certification of the class. (15a.)

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2 The Second Circuit also held that plaintiffs were not entitled to fees under the "common fund" exception to the American Rule, or pursuant to any statute. Plaintiffs do not contend in the petition that they were entitled to fees under either of those possible exceptions.

One member of the Second Circuit panel dissented. He would have remanded the case to the District Court for factual findings as to whether the District Court would have certified a class; whether the complaint would have withstood a motion to dismiss; and whether the lawsuit was the proximate cause of a benefit to the class. The dissenting judge believed that, if findings were made favorable to the plaintiffs, the District Court would be permitted, in its discretion, to award a reasonable fee against defendants. (24a.)

The full panel of the Court of Appeals denied plaintiffs' petition for rehearing, and no eligible judge of the Second Circuit requested that a vote be taken on plaintiffs' request for rehearing *in banc*. (31a-32a.)

REASONS FOR DENYING THE WRIT

I.

THERE IS NO CONFLICT WITH ANY OTHER CASE ON AN ISSUE OF IMPORTANCE WORTHY OF THIS COURT'S REVIEW

The issue presented in this petition does not raise any question of importance worthy of this Court's review. The issue, at best, is of the "academic or the episodic" variety. *Rice* v. *Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74 (1955). It has arisen, to our knowledge, only three times in the history of the Federal Rules—in this case, in the Third Circuit case of *Kahan* v. *Rosenstiel*, 424 F.2d 161 (3d Cir.), *cert. denied sub nom. Glen Alden Corp.* v. *Kahan*, 398 U.S. 950 (1970), and in a Louisiana district court case, *Moreland* v. *Rucker Pharmacal Co.*, 63 F.R.D. 611 (W.D. La. 1974). Each time, resolution of the issue has not rested on general principles, but has required inquiry into the idiosyncratic procedural and factual history of the case.

Moreover, the decision of the Court of Appeals is not in conflict with the decision of this Court in *Deposit Guaranty National Bank* v. *Roper*, 445 U.S. 326 (1980), or the decision of the Third Circuit in *Kahan* v. *Rosenstiel*, *supra*.

In *Roper*, this Court held that the tender of a full monetary settlement to named plaintiffs and the entry of judgment in plaintiffs' favor does not moot an appeal from an order denying class certification where the plaintiff retains an economic interest in class certification, such as in spreading attorneys' fees among the putative class members. 445 U.S. at 336-37, 340. The decision in *Roper*, however, does not touch on the subject of the bad faith exception to the American Rule or violations of Fed. R. Civ. P. 23(e). *Roper* does not in any way conflict with the Second Circuit's decision in this case. *Roper* does not support a fee award against defendants. On the contrary, *Roper* directs the plaintiffs who pursued the litigation to follow the usual course of seeking their fee from "those who will share in . . . benefits" supposedly created by the litigation, *i.e.*, the plaintiff class. *Id.* at 336.

In *Kahan* v. *Rosenstiel*, *supra*, the Third Circuit held, without citation to authority, that a defendant's voluntary correction of its alleged misconduct in response to a class action lawsuit might constitute a violation of Rule 23(e),[3] thereby rendering defendant liable for attorneys' fees. The Third Circuit found that, on plaintiff's version of the facts, the case presented "exceptional circumstances" warranting harsh treatment of the defendant, if he had acted "brazenly" and "flagrantly." 424 F.2d at 168, 164. The Second Circuit held, however, that the facts of this case did not present "exceptional circumstances." The Court of Appeals believed that, pursuant to *Weight Watchers*, *supra*, the tender offer did not violate Rule 23(e). As the panel majority wrote (14a):

> *Weight Watchers* establishes that, at least prior to class certification, defendants do not violate Rule 23(e) by negotiating settlements with potential members of the class. In the instant case, therefore, even if the tender

> offer were deemed to have been a settlement or "compromise," [defendants] neither violated nor ignored Rule 23(e). There is simply no basis for concluding that any of the appellees acted in bad faith, justifying an award of attorneys' fees and costs.

The Second Circuit also held that, on the factual record of this case, the tender offer was not in fact a settlement of the class action. (*See* p. 4, *supra.*) The Second Circuit decision distinguished *Kahan* based on peculiar circumstances that vary with the facts of each case. (*See also* p. 8, *infra.*)

Even a direct conflict with *Kahan* would not require this Court's review. *Kahan* is suspect authority. Although the decision is now seventeen years old, it has never been followed by any court. It is probably not good law in the Third Circuit because it conflicts with the Third Circuit's *in banc* decision in *Webster Eisenlohr, Inc.* v. *Kalodner*, 145 F.2d 316, 320 (3d Cir. 1944), *cert. denied*, 325 U.S. 867 (1945). In *Webster*, the Third Circuit held that a defendant corporation did not violate the predecessor of Rule 23(e) by purchasing the shares of the plaintiff class members without court approval while the action was pending. Under the rules of the Third Circuit, only an *in banc* court has the authority to overrule *Webster*. *See* Internal Operating Procedures, 3d Cir., ch. 8(C).

Kahan is an isolated decision that has never been followed, that was wrongly decided and that may not be good law even in its own Circuit. Any putative conflict between *Kahan* and the Second Circuit decision in this case does not merit this Court's review.

II.

THIS CASE IS NOT A SUITABLE VEHICLE FOR REVIEW BY THIS COURT OF ANY ISSUE PRESENTED IN THE PETITION

Even if the Court did wish to review an issue presented in the petition, this case would be a poor vehicle for doing so.

Plaintiffs' conduct raises questions of waiver that obscure the legal issues plaintiffs seek to raise here. Plaintiffs failed to complain about the alleged errors asserted in the petition in a timely fashion. Plaintiffs' attorneys recommended that their clients accept the tender offer, and advised them that it was not a settlement of the action. Plaintiffs took no action to block the tender offer, inform the court below of it, or preserve from dissipation the hypothetical "fund" from which to claim a fee. Moreover, although plaintiffs sought a fee on the ground that defendants had supposedly violated Rule 23(e), plaintiffs told the District Court that the notice requirements of Rule 23(e) did not apply to dismissal of the action on plaintiffs' motion, because the class had not been certified.

The issues presented for review by this petition are purely hypothetical. Plaintiffs' argument is that *if* the District Court would have granted the certification motion; *then* defendants' conduct, in spite of Second Circuit precedent to the contrary, would have constituted a bad faith violation of Rule 23(e); and *therefore* plaintiffs would have been entitled to collect their attorneys' fees from defendants, instead of the plaintiff class members (*if* plaintiffs could show that the complaint was meritorious and *if* there was a causal connection between the action and the creation of a benefit for the plaintiff class). This hypothetical state of affairs does not present a proper record for review. This Court should not make a sweeping pronouncement of law based on a muddy, fact-based record, and an inappropriate procedural posture.

Conclusion

The petition for a writ of certiorari should be denied.

Dated: New York, New York
September 11, 1987

Respectfully submitted,

DANIEL J. BELLER
1285 Avenue of the Americas
New York, New York 10019
(212) 373-3000

Counsel of Record for Respondents

Kevin McNulty
PAUL, WEISS, RIFKIND,
WHARTON & GARRISON

ZELDES, NEEDLE & COOPER
333 State Street
P.O. Box 1740
Bridgeport, Connecticut 06601
(203) 333-9441

Of Counsel